No. 13802

In the United States Court of Appeals for the Ninth Circuit

BOEING AIRPLANE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Boeing Airplane Company to review and set aside an order of the National Labor Relations Board (R. 285–290)[1] issued against petitioner on March 26, 1953, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, et seq.), herein called the Act. In its answer (R. 4459) the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair labor

[1] References to portions of the printed record are designated "R." Exhibits not reproduced in the printed record are designated "G. C." or "Res." followed by their original number. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

practices having occurred in Seattle, Washington, within this judicial circuit.[2] The Board's decision and order are reported in 103 N. L. R. B. No. 115.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact and conclusions

The unfair labor practices involved in this proceeding began in the latter part of 1948 following the voluntary cessation of a strike by the IAM.[3] During the course of the strike, which was caused by an impasse in collective bargaining, a new Teamsters local[4] was formed and with the encouragement and cooperation of the Company,[5] it carried on an intensive organizational drive among the nonstriking employees. After the end of the strike the IAM, which lost its status as exclusive bargaining representative as a result of the strike,[6] joined in the campaign and for several months the two unions competed vigorously to secure the status of bargaining representative of Boe-

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[2] Petitioner, Boeing Airplane Company, is a Delaware corporation having its principal office in Seattle, Washington, where it is engaged in the manufacture of aircraft and aircraft parts, in the course of which it makes substantial purchases and sales in interstate commerce. No jurisdictional issue is presented.

[3] Aeronautical Industrial District Lodge No. 751, International Association of Machinists, referred to in this brief as "IAM".

[4] Local No. 451, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL, referred to in this brief as "Teamsters."

[5] Boeing Airplane Company, petitioner, referred to in this brief as "Company," or by name.

[6] In *Boeing Airplane Company* v. *N. L. R. B.*, 174 F. 2d 988 (C. A. D. C.), setting aside 80 N. L. R. B. 447, the Court of Appeals for the District of Columbia Circuit held that the strike was unlawful because the IAM did not give the Company the 60 day notice required by Section 8 (d) of the Act and because the strike

ing's employees. It was during this campaign that the Company, which admittedly hoped for the displacement of the IAM by the new Teamsters local, committed its numerous unfair labor practices. Briefly these involved: (1) Giving illegal support and assistance to the Teamsters; (2) interfering with the protected union activities of employees who were members of the IAM; (3) discriminating against employees who were members of the IAM either because of their support of that union, or their expressed opposition to the Teamsters; and (4) discriminating against an employee because she filed a charge with the Board.

The evidence with respect to the Company's unfair labor practices is summarized below:

A. The Company assists and supports the Teamsters in its attempt to displace the IAM as bargaining agent of its employees

Introduction

The IAM had been the collective bargaining agent of the Company's employees since 1938 (R. 68; 2271). Following World War II, the Company was compelled to curtail employment substantially and difficulties

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breached the no-strike clause of the agreement. Section 8 (d) provides that "any employee who engages in a strike within the sixty-day period specified * * * shall lose his status as an employee of the employer in the particular labor dispute, for the purposes of Section 8, 9 and 10 of the Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." Accordingly, the Court concluded, the IAM "forfeited all right to be considered as a collective bargaining agent for the employees of the Company." 174 F. 2d at 991. For other legal aspects of this strike, see *Boeing Airplane Co.* v. *Aeronautical Industrial Lodge*, 91 F. Supp. 596 (W. D. Wash.), affirmed, 188 F. 2d 356 (C. A. 9), certiorari denied, 342 U. S. 821.

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developed between it and the IAM with respect to seniority and wage problems (R. 68; 2323). In 1948, during negotiations for a new agreement, an impasse was reached on these issues and on April 22, a strike was called by the Union (R. 68; 2320, 383). The strike continued until September 13, 1948, at which time an unconditional offer was made to return to work and employees began to apply for reemployment (R. 69; 383).

Soon after the strike began, the Teamsters formed a new local for aeronautical workers and for the first time attempted to organize Boeing employees (R. 188; 2074–2075). Petitions were circulated among the nonstrikers and within a short period several thousand signatures were obtained (R. 188; 2087–2089). The Company permitted professional organizers for the Teamsters to enter the plant and an active campaign was carried on throughout the strike (R. 188–189; 2028–2030, 2086–2088, 2307).

Company officials admitted at the hearing that they welcomed the appearance of the Teamsters on the scene. A letter from President Allen to company officials declared that the Company "did welcome the entry of the A. F. of L. union [Teamsters] into the picture because we hoped that it would give us an opportunity to build a sound employee-management relationship." (R. 187–188; Res. Ex. 43.) Later in the same communication, he stated "At present the attitude of the leadership of 751 [the IAM] makes it appear that we could come much closer to meeting on common ground with the leadership of 451 [the Teamsters] than with that of 751" (*ibid.*). Explaining

Allen's attitude, Vice President Logan testified that the Company's difficulties with IAM prior to the strike had led him to the conclusion that it would be impossible to develop good relations with that union and that he had "some general idea that another outside organization might exercise some restraining influence on * * * the attitude in the relationship between 751 and the Company" (R. 187–188; 2346–2347).

The actions of the Company detailed in the succeeding sections (*infra,* pp. 5–12), in attempting to make the hoped for replacement of the IAM by the Teamsters a reality, form the basis for the Board's finding that the Company gave illegal assistance and support to the Teamsters in violation of Section 8 (a) (2) and (1) of the Act.

1. *The Company gives preference for employment to applicants referred by the Teamsters*

At the time the Company gave permission to Teamsters' organizers to solicit in the plant, it also entered into an arrangement with that union under which the Teamsters were to refer applicants for employment to Boeing (R. 189; 352). The Teamsters thereupon established a hiring hall and with the knowledge of the Company advertised in the Seattle newspapers that it was in a position to place applicants at Boeing (R. 189; 355, 2091–2093). Numerous employees thereafter made applications for jobs at Boeing through the Teamsters (R. 189; 355) and, as is discussed below, were hired immediately by the Company on a preferential basis.

Thus several applicants hired after they received Teamsters referrals had initially applied directly to the Boeing personnel office without success (R. 189–191, 193; 2032–2034, 2045–2047, 2118–2120). Ruby Heston's experience was typical. She testified that during the month of October, 1948 she applied for employment through the Boeing personnel office on four separate occasions but was told that no women were being hired by the Company (R. 193; 2032). Hearing that applicants referred by the Teamsters were being hired, she decided to join that Union, and on October 28, she went down to the Teamsters' hiring hall, joined, and received a referral slip (R. 193; 2033–2034). She returned to the Boeing personnel office with the referral slip that same day and this time was quickly processed and told to report to work on November 1 (R. 193; 2034).

William Klein testified that when he applied directly to the Boeing personnel office in January 1949, it was indicated to him that there was nothing immediately available (R. 189–190; 2046). He too, however, learned that applicants referred by the Teamsters were being placed immediately, so the next day he went to the Teamsters' hiring hall (R. 190; 2046–2047). When he got there he "asked for a job" and, in his words, "they started signing me up" (R. 190; 2047). He received a referral slip, returned with it to the Boeing personnel office and this time, as was Heston's experience, he was quickly processed and told to report to work within a few days (R. 190; 2047).

In addition to Klein and Heston, similar evidence was presented with respect to Clair Boitnott (R. 191; 2118–2120), Charles Courtier (R. 190; 2110–2112) and Anthony Brody (R. 190; 2110–2112). In all cases the employees after being refused employment when they applied directly at Boeing's personnel office, were processed with great dispatch and hired when they joined the Teamsters and received referral slips (R. 189–191, 193; 2118–2120, 2110–2112). The Board found, in agreement with its trial examiner, that during this period individuals referred by the Teamsters were preferred for employment over applicants without such reference (R. 219).

2. *The Company checks off union dues for the Teamsters and makes dues deduction authorizations irrevocable*

Applicants who applied to the Teamsters for employment at Boeing, in addition to joining that Union, also agreed to a check off of monthly union dues (R. 193; 1001–1002, 2038, 2096, 2930, G. C. Exh. 86). Although the Teamsters were at no time recognized or certified as the employees' bargaining agent, the Company honored these check offs and each month paid over to the Teamsters the union dues deducted from its employee's wages (R. 193; 2929–2930).

Boeing at all times has had a company rule permitting employees to cancel any authorized payroll deduction at any time simply by giving the Company written notice (R. 194; 219; Res. Exh. 44, p. 10, G. C. Exh. 178). The Company's timekeepers were supplied with forms addressed to the payroll department which

employees could use to effect such cancellations (R. 277, 80; 862, G. C. Exh. 68). In its agreements with the IAM, when that Union was the bargaining agent for employees, it was provided that deductions would be discontinued whenever the Company received a signed stop notice from the employee involved (R. 277; G. C. Exh. 178, p. 9, Res. Exh. 58, p. 27).

After the strike and the return of the IAM member-employees to work, an article appeared in the November 18, 1948, issue of "Aero Mechanic," the IAM's official newspaper, advising employees that Company forms were available at the timekeepers desks for cancelling dues deduction authorizations (R. 79–80; G. C. Exh. 69). The article, which was written by Arthur C. Gerber, one of the Company's timekeepers, urged members of the IAM to encourage members of the Teamsters to cancel their Teamsters authorizations, and thereby to "get out of the Teamsters." (*Ibid.*)

The article was a success and within several weeks a notable increase in Teamsters' cancellations resulted (R. 80; 866–867). On at least one occasion Gerber, who handled a substantial number of such cancellations himself, ran out of cancellation forms and had to wait a day or two before the Company furnished him a new supply (R. 80; 867). Later, at the height of the poststrike organizational campaign between the IAM and the Teamsters, Gerber prepared a special form which the IAM had mimeographed and promoted, and which employees also could use to cancel their Teamsters' dues deductions (R. 869, G. C. Exh. 7).

Shortly thereafter, on December 7, 1948, Gerber was discharged by the Company because of his efforts to induce members of the Teamsters to cancel their dues deduction authorizations,[7] and authority to process payroll deductions was transferred from the timekeepers to the personnel department (R. 277; 1026). In addition, the Teamsters, which earlier had used revocable dues deduction forms for all members, began early in 1949 to require "irrevocable" forms from individuals whom it referred to Boeing for employment (R. 277; 2930). It was during this period that William Klein, knowing of the Company's rule permitting payroll deductions to be cancelled at any time, went to the personnel department, signed a slip cancelling his Teamsters' dues deduction authorization, and requested that his dues deductions be stopped (R. 193–194; 2048). He was told, however, in the face of the company's rule, that he could not revoke his authorization and despite his protests, dues continued to be deducted from him (R. 194; 2048–2049).

Pointing out that there was no contract between the Teamsters and the Company, and that the Company's own employment rules provided that such deductions as union dues could be cancelled at any time, the Board found, in agreement with its trial examiner, that the refusal to permit Klein to revoke his check off authorization was additional evidence of the Company's unlawful support of the Teamsters (R. 219).

[7] The Board's finding that Gerber's discharge was discriminatory is discussed *infra*, pp. 25–29, 56–63.

3. *An employee is denied promotion to a supervisory job because of opposition from the Teamsters*

Several months after the strike, in December 1948, the chief timekeeper, Morrell, asked a relief timekeeper, Carrig, who was a member of the IAM and a participant in its strike, if he would consider promotion to a supervisor position (R. 191; 2194–2195). Carrig was reluctant at first since appointment to a supervisory job would mean a loss in overtime pay, but he accepted when Morrell told him that the position would be permanent and that Carrig was the one man Morrell had in mind for promotion (R. 191; 2195–2196). It was then agreed that Carrig would continue his current assignment at Moses Lake, several hundred miles from Seattle, and return on January 15, 1949 as a supervisor in the time department (R. 191–192; 2196).

About the 10th of January, Morrell wrote Carrig, who was still at Moses Lake, to disregard his prior instructions and to hold his move in abeyance (R. 192; 2196). On January 25, Morrell came to Moses Lake and told Carrig that his promotion had been stopped by Vice President Logan because of opposition from the Teamsters (R. 192; 2196). Morrell promised to make a further attempt to effect the promotion by sending it up through different channels so that Logan would not have an opportunity to veto it (R. 192; 2197).

Several weeks later, on February 12, 1948, just prior to Carrig's scheduled return to Seattle from Moses Lake, he received another phone call from Morrell's secretary telling him not to leave until Mor-

rell personally contacted him (R. 192; 2197). Morrell met Carrig shortly thereafter and informed him that his promotion to a supervisor had again been stopped by Logan (R. 192; 2197–2198). On this attempt Logan's decision had been appealed to the treasurer of the Company, Bowman, and finally to the president of the Company, Allen (R. 192; 2198). Allen, however, sided with Logan, and as a result the promotion was never put through (R. 192; 2198). Morrell related that Bowman, Boeing's treasurer, had remarked when the case came before him that it appeared that Logan "was in bed with the Teamsters" and there was nothing to be done about it (R. 193; 2199).

The Board found, in agreement with its trial examiner, that the Company assisted the Teamsters by permitting it to veto a promotion (R. 219).

4. *Employees are warned that membership in the Teamsters would put them in a better position to keep their jobs in an impending layoff*

Assistant Foreman Smith told employees Scott and Crozier that members of the Teamsters would have a better chance than others of retaining their jobs in an impending layoff (R. 273, 220–221; 2136–2140). As explained by employee Scott (R. 2137):

> He [foreman Smith] would tell us about the layoffs that were coming; we knew that they were laying people off, but various times he mentioned members of 451 [Teamsters] would have a better chance than some of the rest of us for keeping our jobs.

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that "we have no union and nothing is recognized" (R. 189, 272; 920, 360, 2054). At least one employee, Claude Myrick, was warned that refusal to remove his button "could mean [his] dismissal" and he and most of the others complied (R. 181; 1287).

Stanley Burrell, a woodworker of many years' experience with the Company, however, refused to remove his steward button when told to do so (R. 94; 2054). He had participated in the strike, and on the day of his return to work, he wore a small button stating that he was an IAM committeeman (R. 94; 2053). His foreman, Hassack, came up to him and ordered him to remove his button with the standard explanation: "I don't recognize it." (R. 94; 2054). When Burrell refused, Hossack left but returned in about twenty minutes, again demanded that Burrell remove the button, and when Burrell again refused suspended him indefinitely (R. 94; 2054).

3. The Company prohibits employees from wearing "I am loyal to 751" streamers and suspends Doris Cinotto for refusing to remove one

It is undisputed that following the strike, the Company refused to permit employees returning to work to wear small four inch ribbons which stated "I am loyal to 751"[9] (R. 189, 270–271; 361, 933, 1317, 2063). As in the case of the steward buttons, most employees complied with the demand (*ibid.*).

Doris Cinotto was one of the employees instructed on the day she returned to work after the strike to remove her "I am loyal to 751" ribbon (R. 180–181; 2063). On that occasion she removed it as instructed

[9] "751" was the Lodge number of the IAM local.

(R. 180; 2063). Several days later, however, on September 15, 1948, she again wore the ribbon and this time refused to take it off, with the result that she was suspended for three days (R. 180; 2063–2064).

Conclusions

The Board concluded that the rules applied by some supervisors which prohibited union activity on nonworking time, the rule prohibiting employees from wearing steward and committeeman buttons, and the rule prohibiting employees from wearing "I am loyal to 751" streamers, unreasonably interfered with the concerted activities of the employees and thereby violated Section 8 (a) (1) of the Act (R. 270–272). Reversing its trial examiner (R. 206, 220), the Board found no special plant circumstances reasonably warranting the adoption of these rules from the viewpoint of maintaining production or discipline (R. 270–272). In agreement with its examiner (R. 206–207), the Board found that Burrell's discharge for wearing an IAM committeeman button was invalid (R. 270 and n. 3), and in disagreement with its examiner (R. 220), held that Cinotto's suspension for wearing an IAM ribbon was invalid (R. 272).

C. Employees are discriminated against because of their IAM membership and activities or because of their opposition to the Teamsters

During the course of the organizational campaign and at the height of the rivalry between the IAM and the Teamsters, the Company, through several of its supervisors, utilized numerous opportunities to show its disfavor of the IAM by discriminating against its members in the matter of discharge, discipline,

layoffs, and recalls. The cases of such discrimination found by the Board are considered individually below.

1. *Don J. Parezanin*

Parezanin was employed by the Company in 1947 (R. 78; 713). He became a member of the IAM, serving for a period as a shop committeeman, and participated in the 1948 strike (R. 78; 714). After the strike terminated, he was reemployed (R. 78; 715).

On November 2, 1948, several weeks after the strike, Parezanin was suspended because of his supervisor's belief that he had left his shop without permission to talk to a fellow employee (R. 78; 726–727, 721–722). A few days later he was given a hearing on his suspension before Superintendent Molitor and other supervisors (R. 78; 719). At this hearing Molitor questioned Parezanin about his participation in the strike implying that Parezanin's failure to work during the strike was an act of disloyalty to the Company (R. 78; 720–721). When Parezanin explained that he did not want to go through the picket line because he was a member of IAM, Molitor retorted that the strike was unlawful (R. 78; 721). Molitor then asked what assurance Parezanin would give that he would be loyal to the Company in the future (R. 78; 722). When Parezanin said "My word," Molitor retorted that that would not be sufficient (*ibid.*), and a few days later Parezanin was terminated (R. 78; 722, G. C. Exh. 58).

Molitor denied questioning Parezanin on this subject and contended that Parezanin's discharge re-

sulted solely from his absence from his shop without permission (R. 78–78; 3286). The Board, affirming the trial examiner, discredited Molitor's denial and on the basis of the credited testimony found that although Parezanin may have been absent from his shop without permission and his suspension on November 2 given for a nondiscriminatory reason, his discharge after the hearing was occasioned solely by the Company's resentment against his participation in the IAM strike (R. 203). Accordingly, it concluded that Parezanin's discharge after the hearing violated Section 8 (a) (3) and (1) of the Act (R. 203).

2. Jack Haworth

Haworth was first employed by the Company in 1942, and was working prior to the 1948 strike (R. 97; 1169–1170). He was a member of the IAM and participated in the strike (R. 97; 1170). When the strike ended, he returned to his former position (R. 97; 1170).

Several months later he had a disagreement with Assistant Foreman Charles Pickett (R. 97; 1171–1174). Pickett complained that he had difficulty in getting Haworth to follow directions and reported several incidents to General Foreman Mergorden (R. 98; 3292). He recommended to Mergordon that Haworth be suspended for 3 days (R. 98; 3302).

Megorden, following Pickett's report, had Haworth brought to his office and asked him if he ever had used profane language toward Pickett (R. 98; 3170). Haworth said that he had not and that he was willing to cooperate (R. 98; 3170). Megorden nevertheless

ordered him indefinitely suspended and he was subsequently discharged (R. 98; 3178).

Megorden, when questioned about why he changed Pickett's recommendation that Haworth be suspended for 3 days to a discharge, testified that he received reports that Haworth "was at that time very closely connected with the Union activities going on at the plant there" (R. 98, 208; 3173). Elaborating during cross-examination, Megorden explained that the report of Haworth's union activities had come to him from Pickett who knew those of the employees who were the "ringleaders" in the IAM (R. 3181–3182). The Board found, affirming the trial examiner, that Megorden changed Haworth's recommended suspension to a discharge because of Haworth's participation in union activities on behalf of the IAM, and that the Company thereby violated Section 8 (a) (3) and (1) of the Act (R. 208).

3. *Madeline Haddix*

Haddix was first employed in 1942 as a rivet bucker but at the time of the strike worked on the wash rack (R. 122; 881). She was a member of the IAM and for a period was shop stewardess (R. 122; 882). She participated in the IAM strike, and when it was over returned to her job on the wash rack (R. 122; 882).

On the day she reported for work she was told by the foreman of her shop, George James, that "from now on there will be no discussion of the union either in or out of the plant while at work." (R. 122; 882–883). Several days later, Haddix fell into disfavor with a woman under whose leadership she worked,

with the result that in about a week she was transferred to another wash rack in the shop (R. 122; 883). She worked at the new location until October 21, 1949, received no complaints, and, in fact, was complimented on her performance (R. 123–124; 884).

After she was transferred to the new wash rack, Assistant Foreman Welling, who was in charge of the operation, remarked to Haddix that "there are some people going to be laid off; we will have to lay off some, and I wonder who will be next?" (R. 123; 884). He then turned to Haddix and said "the trouble with you is that you belong to the wrong union." (*Ibid.*) A few weeks after this conversation, on October 21, Haddix was laid off (R. 123; 885).

The layoff slip was given to Haddix by another foreman, Lynn, who told her at the time that the layoff was temporary and that she would be called back (R. 123; 885). Despite this assurance, however, Haddix never has been able to secure reemployment (R. 123; 889). In September 1950 she spoke to Foreman James about her difficulty and asked him if there was anything wrong with her work (R. 123; 889). James replied that there was not (R. 123; 889). Nevertheless she was told in June 1951 by the personnel office that it would be best if she sought work elsewhere (R. 123; 889). Later another foreman, Smith, submitted a requisition to the employment office specifying that Haddix be sent to his department for work, but even this was ineffective (R. 123; 891).

At the hearing Foreman James and Welling both testified that Haddix's work was satisfactory except that she had some difficulty in getting along with her

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fellows (R. 123; 2684, 2680). These officials also testified that Haddix's layoff was occasioned by cancellation of a B–54 contract (R. 123; 2682). However, the Company's records show that the contract was cancelled in April 1949 and resulted in layoffs in April and May, while Haddix was not laid off until October 21, 1949 (R. 123, 277; Res. Ex. L. 38, p. 2). The personnel manager, Selden, confirmed from the Company's records that Haddix was a good worker but stated that a history of three resignations after short periods of employment militated against consideration for rehire (R. 124; 3864). At the same time Selden admitted that the Company had no definite policy in connection with individuals who quit after working for short periods of time (R. 124; 3864).

The trial examiner credited the testimony of Haddix that shortly before her layoff Foreman Welling told her that some workers would be laid off and that she belonged to the wrong union (R. 216). The trial examiner also found that the testimony of personnel manager Seldin concerning the reasons for not rehiring Haddix was pure speculation and that no credible explanation of her rejection had been offered (R. 216). Nevertheless the trial examiner concluded that there was an insufficient showing that Haddix's layoff was discriminatory (R. 216). Reversing this conclusion, the Board found that the statement to Haddix that she belonged to the wrong union in connection with an impending layoff was "an accurate prediction of things to come," pointing out also that the reason assigned for her layoff—cancellation of the B–54 contract—could not be accurate; moreover,

one of the foremen assigning this reason was on vacation at the time of the layoff (R. 277–278).

4. *Dorothy Schott*

Dorothy Schott was first employed in June 1942 and at the time of the strike was a spot welder (R. 176; 1994–1995). She was a member of the IAM and remained out during the period of the strike (R. 176–177; 1995). In October 1948, after the strike, she was reinstated to her job as a spot welder (R. 176–177; 1995).

About 2 or 3 months later, Schott was removed from her spot welders job and assigned to the wash rack, a job usually reserved for beginners (R. 177; 1996). On the day of her demotion, her one-time foreman, Lawrence, noticed her on the wash rack and remarked "What are you doing here, they sure have been downgrading you" (R. 177; 1999–2000). He then grabbed hold of an IAM membership button she was wearing and exclaimed: "Well, Holy God, you have got the wrong button" (R. 177, 220; 2000). He left before Schott had a chance to comment (R. 2000).

Foreman James testified for the Company that Schott was downgraded because there was a surplus of welders in the classification she then held and it was a question of accepting a downgrade or taking a layoff (R. 2000). No explanation was offered, however, as to why Schott was chosen for the wash rack over other spot welders (R. 177, 279–280; 2699–2701).

In view of the foreman's statement, in commenting on Schott's demotion, that she belonged to the wrong

union, and in the absence of any adequate explanation concerning the reason for her selection for downgrading, the Board found, reversing the trial examiner (R. 215, 220–221), that she was demoted because of her membership in the IAM (R. 279–280).

5. *Claude C. Myrick*

Claude Myrick was first employed by the Company in January 1940 (R. 180; 1283). He later left to serve in the United States Marine Corps, but had returned to work by the time of the 1948 strike (R. 180; 1284). His job was as a sheet metal worker (R. 180; 1284).

Myrick was one of the leaders in the IAM, holding the position of committeeman (R. 180; 1284–1285). When the strike was called in 1948, he walked out and engaged in picket duty (R. 180; 1285). Following termination of the strike, he returned to his job (R. 180; 1285).

After his return, Myrick was one of those instructed to remove their IAM committeeman's buttons, being told that failure to do so might result in his discharge (R. 181; 1286–1287). He complied with the demand (R. 1287). Later he was overheard discussing the union problem with an employee named Ray Smith, and was warned by supervisors Watling and Keene that such conduct also could result in his termination (R. 181; 1287–1288).

Still later, about 2 weeks before he was discharged, supervisor Keene engaged Myrick in conversation (R. 181; 1288–1289). Keene stated that it looked as though the IAM would win the impending repre-

sentation election and that Myrick would again be a shop steward (R. 181; 1289). Keene then inquired as to what Myrick's attitude would be, to which Myrick replied that he would make the Company live up to its contract (R. 181; 1289). During this same period, supervisor Watling also engaged Myrick in a conversation about his union activity, this supervisor telling him that he, Myrick, "could be something around here if" he "would forget about the unionism angle" (R. 278; 1290). Shortly before his layoff, Foreman Burnham, who was employed in another shop but who maintained a friendly relationship with Myrick, warned that his layoff was contemplated and said he felt it was motivated by Myrick's union activity (R. 181–182; 1307).

On October 21, 1949, Myrick was laid off, and since has been unable to obtain reemployment (R. 181; G. C. Exh. 116). Foreman Keene testified that he considered Myrick to be the least desirable worker in the shop, and that when it became necessary for economic reasons to reduce the number of employees in the shop, he arranged for Myrick's layoff (R. 182; 3026). Supervisor Watling testified that he was dissatisfied with Myrick's work because Myrick was unnecessarily painstaking and resented any criticism or suggestions in connection with his work (R. 182; 2987–2988). On one occasion, Watling stated, he complained to General Foreman Fite that Myrick refused to respect his orders with the result that Myrick was placed on probation for 30 to 60 days (R. 181; 2990–2991). Myrick was taken off probation several months prior to his layoff, however, and at the hearing

Watling and Keene testified that they considered Myrick's skill good (R. 182; 3023, 2987–2988). This estimate of Myrick's work was confirmed by Superintendent Fairbanks (R. 279; 1292–1293).

At the time of his layoff Myrick had more seniority than anyone in the shop with the exception of one employee (R. 1293). He was unable to secure any explanation for his selection from either Watling or Keene (R. 278; 1292). Superintendent Fairbanks, although vague, did tell Myrick that he had discussed his layoff with a higher official, but the matter was out of his hands; and that he had a job to keep (R. 279; 1293).

The Board found, reversing the trial examiner (R. 218), that Myrick was selected for layoff because of his position of leadership in the IAM (R. 279).

6. *Clyde N. McDonald*

McDonald was first employed in March 1948. He was a member of the IAM and participated in the 1948 strike. Soon after the strike ended, he returned to his former position. (R. 183; 963.)

Following his return to work he was frequently solicited to join the Teamsters by Al Korth, a professional Teamsters organizer (R. 183; 964). On August 5, 1949, while Korth again was attempting to induce McDonald to change his allegiance, McDonald said that if he ever joined an A. F. of L.[10] union, it would be the International Brotherhood of Electrical Workers, not the Teamsters, since he was an electrical worker (R. 183; 965). After McDonald made this

[10] The Teamsters is affiliated with the A. F. of L.

statement, Korth examined McDonald's Company badge which showed his name and department number, and walked over to shop foreman Dietz, who was standing close by (R. 183; 965). Korth engaged Dietz in conversation, and both men kept glancing over at McDonald (R. 183; 965). Within an hour Dietz handed McDonald a layoff slip, saying "get your stuff together, and clear out" (R. 183–184; 965–966).

Dietz offered McDonald no explanation for his layoff (R. 184, 279; 966). Randall, a general foreman of the department in which McDonald was employed, testified, although he had no personal recollection of McDonald as an individual, that McDonald was laid off because of a general reduction in force, McDonald being a recent employee and other employees being more capable (R. 183; 2543–2544). The Company did not offer to call any of McDonald's immediate supervisors to testify concerning McDonald's qualifications.

Considering the precipitous manner in which McDonald was laid off, without warning or explanation, immediately after a discussion between the foreman and the Teamsters organizer following the failure of the organizer to induce McDonald to abandon his IAM allegiance, the Board found, reversing the trial examiner (R. 215), that McDonald was laid off because of his opposition to the Teamsters and preference for the IAM (R. 279).

7. *Arthur C. Gerber*

Gerber was first employed by the Company in 1942 as a timekeeper (R. 79; 852). He joined the IAM and in 1948 participated in the strike (R. 79; 852).

When the strike ended, he returned to work and was reassigned to his regular position (R. 79; 853).

As was mentioned above, *supra,* p. 8, Gerber wrote an article for the November 8, 1948, issue of the IAM newspaper urging members of the Teamsters Union to cancel dues deduction authorizations to that organization explaining how they could do so, and recommending that IAM members assist them to that end (R. 79–80; G. C. Exh. 69). The article was effective and following its publication, the number of cancellation forms processed by Gerber as a company timekeeper markedly increased (R. 80; 861, 876, 866–867).

After the article appeared, Gerber noticed a change in the attitude of the foremen in the shop to which he was assigned (R. 80; 867–868). A superintendent, Kravic, for example, who formerly was friendly, ceased being so, and a week after publication of the article asked Gerber if he had a copy of the cancellation blank (R. 867–868). It was shortly thereafter that the Company transferred the function of processing the deduction blanks from the timekeepers to the personnel department (R. 277; 1026).

On December 7, 1948, without prior warning Gerber was handed a termination notice by his assistant foreman, John Marx, the notice stating that Gerber was discharged for "making threats to fellow employees" (R. 80; 853, G. C. Exh. 66). Marx stated that he had nothing to do with the termination, the slip having been given to him in an envelope with instructions to sign it (R. 80; 853). Others who signed the slip were Isaacson, personnel manager, and Mor-

rell, the chief timekeeper and department head (G. C. Exh. 66). There were no signatures in the spaces provided for foreman and division head, although the form stated that the signature of the division head was "required in cases of dismissal" (G. C. Exh. 66).

Morrell testified that he arranged for Gerber's discharge 2 or 3 days after he obtained written statements from employees claiming that they had been threatened by Gerber with loss of their jobs if they did not join the IAM (R. 81, 274; 2713–2714, 2717). This testimony was contradicted, however, by the Company's records and by the testimony of Fred Huleen, the Company's Assistant Labor Relations Manager, which established that no written statements were secured from employees until 8 or 9 days *after* Gerber's discharge and, furthermore, that Morrell *played no part* in securing such statements (R. 274; 2723–2724, 2726). Gerber also contradicted Morrell's testimony, testifying in his own behalf that he was told by Morrell that he, Morrell, placed no faith in any accusations that Gerber had threatened employees (R. 80, 275; 855). It was not denied by Morrell that he refused to identify to Gerber any of the employees allegedly threatened by him (R. 855).

At Gerber's request, a hearing on his discharge was held before a supervisory review board on December 13, 1948 (R. 80–81, 275; 856–857). This Board professed complete ignorance of his case or the reasons for his discharge (R. 858). Gerber informed the panel that he had processed numerous dues deduction cancellations, but denied in a formal affidavit that he ever made threats to his fellow employees (R. 80–

81; 859, G. C. Exh. 67). Morrell was called as a witness before this review board (R. 274; 2723–2724), but did not appear before it together with Gerber (*ibid.*), contrary to the implication of Morrell's testimony (R. 274; 2714–2715), credibly contradicted by Gerber (R. 274; 4138–4139).

About one week after the board hearing, Gerber was notified through Morrell that the board had upheld the discharge (R. 81, 275; 859–860). Gerber appealed to Fred Huleen, assistant labor relations manager, suggesting that his activity in promoting the cancellation of Teamsters' dues deductions might explain the discharge (R. 81, 275; 860). According to Gerber, Huleen, referring to a little black book in his inside pocket, charged Gerber with putting through 10 Teamster cancellations (R. 81; 860, and see the implicit admission at R. 2719). Later, without explanation, Huleen told Gerber that he would not change the action already taken (R. 81, 275; 871).

Finally, Gerber appealed to President Allen, repeating his denial that he ever made any threats to employees (R. 871, G. C. Exh. 71). Pointing out that his accusers had not been identified, he submitted a list of all employees on his shift, asking that they be interviewed by Allen to determine whether the charges were true (G. C. Exh. 71). This last appeal was referred to one of Allen's assistants, who informed Gerber that he saw no reason to reconsider this case (R. 872, G. C. Exh. 72).

The Board found that Gerber was discriminatorily discharged because of his successful efforts to induce members of the Teamsters union to cancel their dues

deduction authorizations (R. 273–277). In so finding, the Board reversed its trial examiner who had credited at face value Morrell's testimony that he discharged Gerber because he had made threats to employees who would not join the IAM (R. 204). The Board in explaining its disagreement with the Trial Examiner, stated that "It is the Board's policy to adopt the Trial Examiner's credibility findings, except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect" (R. 273). It concluded, from a review of the whole record, that Morrell's explanation could not be accepted as trustworthy (R. 273–277).

D. The Company refuses to recall employee Christina M. Nielsen because she files a charge with the Board

Employee Nielsen was first employed in 1942 (R. 173; 1955). She was a member of the IAM and participated in the strike (R. 173; 1956). When it was over she was returned to work in her former position (R. 173; 1957).

On March 3, 1950, she was laid off (R. 173; G. C. Exh. 172). She immediately protested to Foreman Graue that neither her workmanship nor seniority justified her selection (R. 173; 1959–1960). About a week later when she applied for rehire, she was assured by Ray Cottet in the personnel office that she would be recalled in a routine manner when the work load made it possible (R. 174; 1966).

In September 1950, she filed a charge with the Board against Boeing alleging that her layoff in March had been discriminatory (R. 174; 1967). She then returned to the personnel office and told Cottet

what she had done (R. 174; 1968). Within a day or two she heard from the Company's assistant labor relations manager, Huleen, that she was marked undesirable for rehire because of a poor work record (R. 174; 1969).

Noting the change in the Company's attitude towards rehiring Nielsen after she filed a charge with the Board, the Board found, reversing the trial examiner's conclusion but accepting his underlying findings (R. 215, 221), that she was discriminated against because of filing a charge (R. 280).

II. The Board's order

Based on its findings of unfair labor practices, the Board ordered the Company to cease and desist from (a) discouraging or encouraging membership in any labor organization by discriminating against employees; (b) discharging or otherwise discriminating against any of its employees because they filed charges with the Board; (c) assisting or supporting the Teamsters or any other labor organization; (d) promulgating or enforcing rules which prohibit union activity on nonworking time, or which prohibit employees from wearing steward or committeeman buttons, or which prohibit employees from wearing streamers or any other insignia indicating their adherence to any labor organization; and (e) in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act (R. 285–286). Affirmatively, the Board ordered the Company (a) to offer reinstatement to Parezanin, Burrell, Haworth, Gerber,

Haddix, Myrick, McDonald, and Nielsen, and to make each of them, as well as Schott and Cinotto, whole for any loss of pay sustained as a result of the discrimination and (b) to post appropriate notices (R. 286–287).

ARGUMENT

I. The Board's finding that the Company violated Section 8 (a) (2) and (1) of the Act by assisting and supporting the Teamsters is supported by substantial evidence on the record considered as a whole

During a representation contest between the IAM and the Teamsters, the Company, which hoped for a Teamsters victory, actively assisted and supported that Union's organizational efforts. The whole of the Company's unfair labor practices amply supports this conclusion. We consider under this heading that part of its conduct wherein it gave preference to applicants for employment referred to it by the Teamsters; refused to permit the cancellation of Teamsters' check-off authorizations by its employees; revoked the promotion to a supervisory position of an employee named Carrig because of opposition from the Teamsters; and indicated to employees that they would have a better chance of retaining their jobs in an impending layoff if they were Teamsters members. This conduct gave assurance that many new employees would support the Teamsters, that that union would be in a favorable financial condition, that its prestige among employees would be enhanced at the expense of the IAM, and that employees could expect better treatment if they were Teamsters adherents. By thus attempting to "entrench the [Teamsters] among the

employees" (*Virginia Electric and Power Co.* v. *N. L. R. B.,* 319 U. S. 533, 540), it is clear that the Company failed in its duty to "maintain a strictly neutral attitude" (*N. L. R. B.* v. *Ronney & Sons Furniture Mfg. Co.,* 206 F. 2d 730, 735 (C. A. 9) certiorari denied, Jan. 18, 1954), and thereby violated Section 8 (a) (2) and (1) of the Act, as it has long been settled (*N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584; *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 78; *N. L. R. B.* v. *Idaho Refining Co.,* 143 F. 2d 246, 248 (C. A. 9); *N. L. R. B.* v. *Northwestern Mutual Fire Assn.,* 142 F. 2d 866, 868 (C. A. 9), certiorari denied, 323 U. S. 726; *N. L. R. B.* v. *Thompson Products,* 141 F. 2d 794, 799 (C. A. 9); *N. L. R. B.* v. *Carlisle Lumber Co.,* 94 F. 2d 138, 143, 144 (C. A. 9), certorari denied, 304 U. S. 575).

We turn to consider the particular conduct involved in this branch of the case:

1. With respect to the finding that the Company gave preference for employment to applicants referred by the Teamsters, as shown (*supra,* pp. 5–7), five individuals, refused employment when they applied directly to Boeing, were hired immediately when they joined the Teamsters and obtained Teamsters' referral slips. To defeat the inference that referral by the Teamsters was the reason for hiring the employees despite the previous rejection of them, the Company asserts merely that the "effect of the referral is purely conjectural" (Br. p. 68). But it could hardly be coincidence that, as in the case of Heston (*supra,* p. 6), she should be previously rejected four times but hired at once on the same day that she joined the Teamsters and received a referral

slip from it; or, as in the case of Klein (*supra,* p. 6), that he should be rejected one day but hired the next day when he presented himself with a Teamsters referral slip; or, as in the case of Boitnott (Co. Br., pp. 68–69), that applying twice on the same day, he should be rejected the first time but accepted when he reapplied armed with a Teamsters referral slip. The Board was amply warranted in inferring that the relationship was not "merely coincidental";[11] it plainly sufficed to established a prima facie case; and if there were other reasons than referral by Teamsters for the hire of these applicants by the Company, such information "lay exclusively within [the Company's] own knowledge," and it failed to introduce any persuasive evidence rebutting the prima facie case.[12] In this connection, the Company asserts (Br., p. 68), with respect to applicants Courtier and Brody only, that they "applied in September during a period when the Company had suspended hiring new applicants in order to return strikers to the payroll as soon as possible." But the facts are, as the Company's own records show, that the Company hired 748 new applicants in September 1948 and 780 in October (G. C. Exh. 212), which would hardly indicate that the failure to employ Courtier and Brody when they applied without a Teamsters referral slip had anything to do with a supposed policy against employing new appli-

[11] *N. L. R. B.* v. *Stone*, 125 F. 2d 752, 756 (C. A. 7), certiorari denied, 317 U. S. 649.

[12] *Montgomery Ward & Co.* v. *N. L. R. B.*, 107 F. 2d 555, 560 (C. A. 7); *Law* v. *N. L. R. B.*, 192 F. 2d 236, 237–238 (C. A. 10); *N. L. R. B.* v. *Wallick & Schwalm*, 198 F. 2d 477, 483 (C. A. 3).

cants in favor of strikers. The Company also relies upon "testimony of six other persons that they had [Teamsters] referrals and yet did not succeed in securing employment" (Br., p. 69). But these persons, unlike the applicants who were hired, had all participated in the illegal strike (*supra,* p. 3, n. 6), and for this reason they of course stand on a different footing from applicants referred by the Teamsters who were not associated with the strike.

2. Amply supported by the evidence (*supra,* pp. 7–9) and uncontroverted by the Company (Br., pp. 66–67, 69–70), the Board found that (1) the Company's employment rule, outstanding at all times, was to permit an employee to cancel any checkoff of union dues previously authorized by the employee, (2) pursuant to this rule IAM adherents induced many employees to cancel the checkoffs which they had previously authorized in favor of the Teamsters, (3) following such large scale cancellations, the Teamsters instituted checkoffs irrevocable for one year which they required applicants they referred to the Company to sign, and (4) despite its outstanding rule, and in the absence of any agreement with the Teamsters which was at no time recognized as the employees' bargaining representative, the Company nevertheless refused to permit an employee to cancel his irrevocable check off to the Teamsters but deducted union dues from his pay over his protests. That this conduct by the Company—forcing employees to continue contributions to the Teamsters despite the Company's own outstanding rule to the contrary—was assistance to the Teamsters need not be labored. Compare, *Vir-*

ginia Electric and Power Co. v. *N. L. R. B.*, 319 U. S. 533, 540; *N. L. R. B.* v. *Idaho Refining Co.*, 143 F. 2d 246, 248 (C. A. 9); *N. L. R. B.* v. *Carlisle Lumber Co.*, 94 F. 2d 138, 143, 144 (C. A. 9), certiorari denied, 304 U. S. 575.

To defend its conduct, the Company relies on Section 302 (c), Title III, Labor-Management Relations Act (Co. Br., p. 70). But that section is beside the point. It first provides, under criminal sanction of fine or imprisonment or both for a violation (Sec. 302 (d)), that it "shall be unlawful for any employer to pay * * * or to agree to pay * * * any money to any representative of any of his employees * * *. (Sec. 302 (a).) It then excepts from this prohibition "money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." This section was enacted in the interest of the employee, its objective being to make sure that dues would not be deducted unless an employee authorized it in writing and also to prevent committing an employee for a period longer than one year. S. Rep. No. 105, 80th Cong., 1st Sess., 52 (Supplemental Views); H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 67; 93 Cong. Rec. 4678. But this section imposes no obligation upon the employer to check off union dues; whether he does or not is a matter for his own decision (subject to his duty to bargain in good faith with the exclusive bargaining

representative on the subject). Thus, in this case, it is sleeveless for the Company to point to Section 302 (c) as justification for assisting the Teamsters by refusing to cancel a check off authorization at an employee's request; the Company's departure from its own outstanding rule to honor such requests was not required by Section 302 (c) but was simply another instance of its desire to aid the Teamsters. That the check-off authorization was irrevocable for one year is a matter between the employee and the Teamsters. Section 302 (c) did not invest the Company with the power of a court to enforce any obligation between the employees and Teamsters with respect to their check-off arrangement. As before the amendment of the National Labor Relations Act, so now, "It is the purpose of the statute to see that the employer does not interfere or intrude into the affairs of the employees." *N. L. R. B.* v. *Security Warehouse,* 136 F. 2d 829, 832 (C. A. 9).

3. The Board found that the Company failed to promote an IAM adherent (Carrig) to a supervisory position because of the Teamsters' opposition (*supra,* p. 11). As shown (*supra,* pp. 10–11), despite the chief timekeeper's desire to promote Carrig, the Company's vice president vetoed the assignment; the chief timekeeper explained, as Carrig testified, that the promotion failed to go through because of opposition from the Teamsters with whom the vice president "was in bed." Objecting to this supporting evidence as hearsay, the Company nevertheless concedes that the chief timekeeper was "authorized to recommend Carrig for promotion and to advise him that he had not been

promoted * * *'' (Co. Br., p. 71). This authority obviously carried with it the authority to explain the reasons for not receiving a promised promotion; it would be strange to have a supervisor empowered to recommend promotions, to inform the employee of the decision, but to stand mute as to the reasons for the decision. And it is the settled rule that ''Statements of an agent to a third person are admissible in evidence to prove the truth of facts asserted in them as though made by the principal, if the agent * * * was authorized to make, on the principal's behalf, true statements concerning the subject matter.'' Restatement, Agency, Sec. 286 (and see comments thereto). The Company claims that, ''In any event, the incident is so trivial as not to amount to assistance and support'' (Br., p. 71). But the failure to promote an employee at the instance of one union because of the employee's adherence to a rival union is hardly a trivial offense. See *N. L. R. B.* v. *Bell Aircraft Corp.*, 206 F. 2d 235 (C. A. 2).

4. To defeat the Board's finding that through its assistant foreman the Company warned employees that they would have a better chance of retaining their jobs in an impending layoff if they were members of the Teamsters (*supra*, pp. 11–12), the Company contends that these warnings were isolated (Br., p. 29). Acceptance of this view requires disregard of the Company's whole pattern of preference for the Teamsters to which these incidents are related. The same rule which requires that the whole of the record be considered before sustaining a Board finding requires that the whole of the record be taken into account be-

fore disregarding as isolated admitted warnings consistent with and representative of the Company's entire attitude and conduct.

II. The Board properly found that the Company violated Section 8 (a) (1) of the Act by the following rules: (1) The rule prohibiting employees from wearing IAM steward and committeeman buttons; (2) the rule prohibiting employees from wearing "I am loyal to 751" streamers; and (3) the rule applied by some supervisors which prohibited union activity on nonworking time

1. *The rule prohibiting employees from wearing IAM steward and committeeman buttons*: As shown (*supra,* pp. 13–14), the Company forbade the wearing of buttons by employees identifying them as IAM committeemen and stewards; one employee (Burrell), who refused to remove his IAM committeeman button on request, was for this reason suspended indefinitely by the Company. If the rule forbidding the wearing of committeemen and steward buttons was invalid, there is no question that the employee's indefinite suspension for its infraction was likewise invalid. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 805.

That the rule was invalid is settled by the Supreme Court's decision in *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793. The sole justification advanced by the Company for banning the wearing of committeemen and steward buttons was that "we have no union and nothing is recognized" (*supra,* p. 14). As explained by the Company's vice president in charge of industrial relations (R. 365), the buttons were banned "because they were not authorized by any existing contract; there were no shop

committeemen in the plant, hence why wear buttons?" It was precisely this argument which was advanced by the employer in the *Republic Aviation* case (324 U. S. at 801):

> Petitioner looked upon a steward as a union representative for the adjustment of grievances with the management after employer recognition of the steward's union. Until such recognition petitioner felt that it would violate its neutrality in labor organization if it permitted the display of a steward button by an employee. From its point of view, such display represented to other employees that the union already was recognized.

The Supreme Court rejected this argument; agreeing with the Board that such rules "against the wearing of insignia must fall as interference with union organization" (324 U. S. at 803), the Supreme Court quoted with approval from the Board's decision (324 U. S. at 802, n. 7):

> We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employees, especially when, as here, there is no competing labor organization in the plant. Furthermore, there is no evidence in the record herein that the respondent's employees so understood the steward buttons or that the appearance of union stewards in the plant affected the normal operations of the respondent's grievance procedure. On the other hand, the right of employees to wear union insignia at work has long been recognized as a reasonable and

legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act.

In its brief (p. 24), excising that portion of the Board's language concerning the impermissibility of banning union insignia "especially when * * * there is no competing labor organization in the plant," the Company claims that since the IAM was in competition with the Teamsters the banning of IAM steward and committeeman buttons was proper. But this is a gross shift in meaning. A rule which is without warrant "especially" in the absence of competing unions does not have warrant because of the lack of the parenthetical special factor; a further "especial" reason for the rule's invalidity cannot be transformed into the sole reason for invalidating the rule. In this case, the wearing of IAM steward and committeeman buttons could hardly mislead any employee into believing that the Company was recognizing the IAM. Even before the members of the IAM ended their strike and returned to work, the Company frequently and widely advertised that the IAM had lost its representative status by authorizing the strike (*supra,* p. 3, n. 6). After the strike, it was no secret that the Company favored the Teamsters in the latter's active campaign to secure designation as bargaining representative. In addition employees knew that an election had been scheduled by the Board for the sole purpose of determining which union, if any, would represent them. The Company's asserted maintenance of neutrality in these circumstances is a

hollow reason for prohibiting the wearing of IAM steward and committeeman buttons.

Furthermore, as was conclusively settled in *Republic Aviation,* that a union is not currently recognized as bargaining representative is no reason to forbid wearing of steward or committeeman buttons. The Company erroneously assumes that the only function of the union steward is to represent employees where there is a collective bargaining relationship with the employer. The fact is that it is common practice to select shop stewards before any bargaining relationships are established. Their function, in such cases, is not to deal with the employer, but to act as an intermediary between the employees and the union in such matters as "collecting union dues" from members, keeping "the members informed of union activities and organization policies," providing "leadership in all internal union questions," "signing up union members," and the like. (See *Preparing a Steward's Manual,* Bull. No. 59, Dept. of Labor, Division of Labor Standards, pp. 5, 13–14 (1943).) Thus, a union's designation of certain members to act as stewards at a particular plant is not dependent on its having achieved a collective bargaining status and the right of employees to wear such buttons is unaltered by the fact that "no union was recognized."

The Company further urges that "unusual circumstances" existed in this case and that "unusual circumstances" were recognized in *Republic Aviation* (324 U. S. at 804–805) as justifying qualification of the otherwise existing right to wear IAM steward

and committeeman buttons. Those unusual circumstances are stated to be the bitterness engendered by the strike which required curtailment of union activity in order to prevent an outbreak of violence between IAM and Teamsters adherents.[13] (Co. Br., pp. 24–25.) It suffices to say at this point, as the Board observed (R. 272), that this was never advanced as the reason for the rule by the Company even at the time of hearing, its sole explanation for the rule being the grounds previously discussed. It is unnecessary to labor the unreliability of a reason which is a "palpable afterthought" (*N. L. R. B.* v. *Wells, Inc.*, 162 F. 2d 457, 459 (C. A. 9)); the Company cannot convincingly justify its rule by ascribing it to

[13] It was on this ground that the trial examiner *sua sponte* apparently held the Company's rule against wearing IAM steward and committeeman buttons to be privileged (R. 206). The examiner nevertheless held that the indefinite suspension of employee Burrell for infraction of this rule was invalid (R. 206–207). He explained that: "I have accepted as believable and reasonable Respondent's explanation that the atmosphere in the plant for a period following the end of the strike was sufficiently tense and unfriendly as to require the Respondent to impose strict rules of conduct upon employees to avert possible violence and I have considered the case of Stanley Burrell in this light. However, I am unable to agree with the contention of the Respondent that its action in discharging Burrell was reasonably related to the accomplishment of this result. I do not understand how it could be that the wearing of a badge indicating an individual to be a committeeman for a labor organization, even though such office lacked any sanction from the Respondent, was such a manifestation of union adherence as would probably provoke dispute. I find that Stanley Burrell had a right to wear a badge indicating that he had been designated by Lodge 751 as a committeeman and that Respondent's discharge of him when he refused to remove it discouraged membership in and activity on behalf of Lodge 751 and that the Respondent thereby violated Section 8 (a) (3) and (1) of the Act."

unusual circumstances which did not occur to it as the reason for promulgating the rule. This aside, we show under the next heading the lack of merit to the Company's claim of unusual circumstances.

2. *The rule prohibiting employees from wearing "I am loyal to 751"*[14] *streamers:* As shown (*supra,* pp. 14–15), the Company forbade the wearing by employees of four-inch ribbons stating "I am loyal to 751"; an employee, refusing to remove this ribbon upon request, was suspended by the Company for three days. As with the rule against wearing IAM steward and committeeman buttons, if the rule against wearing these ribbons was invalid, the suspension for refusing to obey the rule was also invalid (*supra,* p. 38). And since, as was settled in *Republic Aviation,* the wearing of union insignia in the form of steward buttons is protected against employer infringement, the wearing of four-inch union ribbons is obviously in the same protected class.

According to the Company's vice president in charge of industrial relations (R. 360), "We would not permit them to wear the streamers, because they were incendiary, and inflammatory in nature; our problem was to stop any inflammatory matters and fighting." The trouble with the Company's claim is that there is no reasonable relationship between wearing union ribbons and provoking disorder. The same official of the Company admits that (R. 360): "The standard union identification button has always been worn in our plant, before, during and subsequent to the strike; we have never objected to it." But there is no

[14] "751" was the local designation of the IAM.

difference, except an insignificant one of size (the ribbon being slightly larger), between a union ribbon and an ordinary membership button. Both insignia simply display adherence to the union represented. The inscription on the ribbon expresses nothing that an ordinary membership button does not imply, namely, that the wearer is loyal to his union. If the button provokes no disorder, neither does the ribbon. Nor was there evidence that the Company ever voiced concern about a disorder to the employees directed to remove their ribbons, or that any such disorders ever occurred as a result of their display. In short, the wearing of the "I am loyal" ribbons neither provoked nor connoted more than did the wearing of ordinary membership buttons during an organizational compaign. There is no basis in reason for justifying the ban of union ribbons because of plant tension and strike bitterness where the Company itself discerned in that situation no reason for prohibiting the indistinguishable activity of wearing membership buttons.

As the Board further explained in rejecting the contention "That these rules were necessary in order to prevent friction and clashes between adherents of the rival unions" (R. 271):

> The [Company] had adopted other rules, such as those prohibiting name calling or derogatory remarks, which would accomplish the same results. Furthermore, it is to be noted that the [Company] permitted organizers for both unions to have unrestricted access to contact employees during working hours at different times, a practice plainly more likely to be

> productive of clashes and disruptive of production than wearing insignia. * * * As for the "I am loyal to 751" streamers, we find no reasonable basis in the record upon which it can be said that they are any more inflammatory, or any more likely to provoke clashes or other types of disorder, than any other manifestation of union adherence, such as a membership button.

The Board's determination that the so-called unusual circumstances assigned by the Company did not warrant qualification of the rights otherwise vouchsafed the employees is a judgment especially entitled to respect because "made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 800. Nor did the amended Act "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 488. "Particularly in this area of mixed fact and law, a court will not lightly disregard the overall appraisal of the situation by the Labor Board * * *" *N. L. R. B.* v. *Reed and Prince Mfg. Co.,* 205 F. 2d 131, 134 (C. A. 1), certiorari denied, 74 S. Ct. 139.

3. *The rule applied by some supervisors which prohibited union activity on nonworking time:* As shown (*supra,* pp. 12–13), many employees following their re-

turn to work after the strike were instructed by their supervisors to refrain from all union activity on Company property at any time, working or nonworking.[15] It is now well settled that such an unlimited restriction "must be presumed to be an unreasonable impediment to self-organization * * * in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 804, n. 10, quoting with approval from *Peyton Packing Company,* 49 N. L. R. B. 828, 843–844. See also, *N. L. R. B.* v. *American Tube Bending Co.,* 205 F. 2d 45, 46 (C. A. 2); *N. L. R. B.* v *Lake Superior Lumber Co.,* 167 F. 2d 147 (C. A. 6); *N. L. R. B.* v. *La Salle Steel Co.,* 178 F. 2d 829, 833–834 (C. A. 7), certiorari denied, 339 U. S. 963.

The Company makes no attempt to justify this restriction on the basis of special circumstances. It contends only that "there is no evidence that the rule in question was ever enforced," and while conceding that it never "repudiated" the restriction, it claims in extenuation that it was not "brought to the attention of the higher echelons of management in order to permit repudiation" (Co. Br., pp. 28–29). The defense is without merit. The inhibitory effect flows from the mere existence of the restriction with-

[15] In its brief (p. 27), the Company states that only five employees so testified, but the fact is that eight employees testified to having been instructed to this effect (*supra*, p. 12), one in the presence of five or six other employees (R. 906). Furthermore, according to the testimony of three supervisors (R. 3159–3161, 3184–3185, 3195–3196), they issued these instructions to *all* the employees working under them, although it does not appear how many there were.

out the need for its enforcement. That there was no enforcement may have resulted from no circumstance other than that no employee attempted to breach the restriction. Employees who breached the prohibition against wearing IAM ribbons and steward buttons had been suspended; the employees had no reason to suppose that the same would not be true of the breach of this restriction. Nor is it sound for the Company to claim that, since higher management was unaware of this restriction, no account should be taken of the failure to repudiate it. Absence of repudiation left the full force of the restriction intact. Higher management had put the supervisors in the position to impose the restriction; it was up to management to monitor the exercise of conferred power. Employees have every reason to believe that supervisors do what management expects them to do. And so management is properly responsible for dissipating the effect of supervisory conduct. *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 78; *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 518–520; *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 598.[16] See also, Restatement, Agency, Vol. I, Sec. 8, Comment on.

III. The Board properly found that the Company violated Section 8 (a) (3) and (1) of the Act by discriminating against seven employees either because of their membership and activities on behalf of the IAM or opposition to the Teamsters

The Board found that the Company discriminated against seven employees either because of their IAM

[16] The Company's reliance (Br., p. 28) on *Ohio Associated Telephone Co.* v. *N. L. R. B.*, 192 F. 2d 664, 668–669 (C. A. 6), is misplaced. In that case a *repudiated* and unenforced restriction *in the absence of other unfair labor practices* was held to be uncoercive. There is no parallel between that case and this.

proclivity or their Teamsters antipathy. As to two of these employees (Parezanin and Haworth, *supra,* pp. 17, 18), the Board and its trial examiner were in agreement; as to four other of the employees (Haddix, Schott, Myrick, and McDonald, *supra,* pp. 20, 22, 24, 25), the Board accepted all of the examiner's underlying findings but disagreed with his ultimate conclusion and found that these employees had been discriminated against; as to the seventh employee (Gerber, *supra,* p. 29), the Board found that this employee had also been discriminated against, and this conclusion rested in part upon its reversal of a credibility determination of the examiner. Except with respect to the latter employee,[17] the Company, in contesting the Board's conclusions, states that it accepts all the credibility determinations adopted by the Board, but differs with it "solely as to the weight to be given the credited evidence and the inferences which may reasonably be drawn therefrom * * *" (Co. Br., p. 31). Thus, the Company requests this Court to reweigh the evidence and draw its own inferences and on this basis to reverse the Board's conclusions.

The Company assumes a standard of judicial review of administrative findings which is patently erroneous. As this Court has explained more than once, "where the evidence fairly supports * * * conflicting inferences the Board's choice may not be displaced, even though we might reach a different conclusion if the matter were before us *de novo.*" *N. L. R. B.* v. *L.*

[17] We discuss this employee, and the special question of the standard of judicial review applicable to this case, separately, *infra*, pp. 56–63.

Ronney & Sons Furniture Mfg. Co., 206 F. 2d 730, 737 (C. A. 9), certiorari denied, Jan. 18, 1954; *N. L. R. B.* v. *San Diego Gas and Electric Co.,* 205 F. 2d 471, 475 (C. A. 9); *N. L. R. B.* v. *West Coast Casket Co., Inc.,* 205 F. 2d 902, 906–907 (C. A. 9). "In cases arising under the National Labor Relations Act, the courts are not permitted to weigh the evidence, resolve its conflicting inferences, nor draw their own inferences therefrom." *N. L. R. B.* v. *W. C. Nabors,* 196 F. 2d 272, 275 (C. A. 5), certiorari denied, 344 U. S. 865; *N. L. R. B.* v. *Southland Mfg. Co.,* 201 F. 2d 244 (C. A. 4). To show that evidence is capable of disparate interpretation is to show a reason for confirming, not rejecting, the inference reasonably drawn by the Board. *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 488.

It is for this reason that it makes no difference, in the case of the four employees as to whom the Board accepted the examiner's underlying findings, that the Board disagreed with the examiner in evaluating the import of the subsidiary facts. In this situation, as the Company does not dispute, since the significance of an examiner's report "depends largely on the importance of credibility in the particular case" (*Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 496), and the examiner's rejected inferences do not rest on his superior advantages in determining credibility, they are entitled to no independent weight as a factor detracting from the Board's conclusion. *N. L. R. B.* v. *Akin Products Co.,* 33 L. R. R. M. 2280 (C. A. 5, December 22, 1953); *Morand Bros. Beverage Co.* v. *N. L. R. B.,* 204 F. 2d 529, 533–535 (C. A. 7), cer-

tiorari denied, 346 U. S. 909; *N. L. R. B.* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 751–752 (C. A. 9). It is the Board's findings, not those of the examiner, which the statute states "shall be conclusive" when "supported by substantial evidence on the record considered as a whole." Section 10 (e) of the Act.

We now show that "the most that can be said in favor of [the Company] on the question of fact is that the evidence permits conflicting inferences, and that is not enough." *Texas & N. O. R. Co.* v. *Brotherhood of Ry. S. Clerks,* 281 U. S. 548, 559.[18]

1. Don J. Parezanin

The facts with respect to the discharge of Parezanin are summarized *supra,* pp. 16–17. As shown, while Parezanin was suspended by his supervisor for the nondiscriminatory reason that he had absented himself from the shop without permission, at the Company hearing on the suspension it was clear that the suspension was transformed into a permanent discharge for the discriminatory reason of having participated in the IAM strike[19] and thereby showed the unreliability of his loyalty to the Company. Thus, at

[18] The same erroneous approach to judicial review underlies the Company's treatment of the questions of assistance, discussed *supra*, pp. 32–33, as reflected in its statement that "the evidence * * * relied upon by the Board does not preponderate in support of its finding that Boeing unlawfully assisted and supported Local 451" (Co. Br., p. 71).

[19] The Company does not contest that, once having restored Parezanin to employment, it was thereafter no longer free to rely upon the unlawfulness of the strike as a reason for discriminating against him. In addition to the discussion at R. 194–198, see also *N. L. R. B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885 (C. A. 2), certiorari denied, 342 U. S. 871; *N. L. R. B.* v. *Wallick & Schwalm*, 198 F. 2d 477, 483–484 (C. A. 3).

the Company hearing, Superintendent Molitor charged that Parezanin's participation in the IAM strike was an act of disloyalty to the Company, and refused to accept Parezanin's "pledge" that he would be "loyal" to the Company in the future. Molitor denied making this statement but the discrediting of his denial raises merely a question of credibility which the Company agrees is not open on judicial review. In the context of the Company's hostility to the IAM and partiality for the Teamsters, the credited evidence amply supports the Board's conclusion that Parezanin was discharged for discriminatory reasons.

2. Jack Haworth

The facts with respect to the discharge of Haworth are summarized *supra,* pp. 17–18. As shown, while Haworth's immediate supervisor recommended only a three-day suspension for failing to follow directions, Haworth was discharged instead of briefly suspended because, in Foreman Megorden's words, Haworth "was at that time very closely connected with the union activities going on at the plant there." It is fundamental that a discharge motivated by an employee's "union activities" is unlawful.

The Company contends, in the face of Foreman Megorden's admission, that the Board's finding is unsupported by substantial evidence. But there is no gainsaying its foreman's frank expression of his anti-union motivation. Foreman Megorden was neither unaware of what he was saying nor were his remarks taken out of context. Megorden made the statement that Haworth "was at that time very closely

connected with the union activities going on at the plant" in answer to a direct question by one of Company's own counsel, Mr. Coie, about Haworth's conduct at work (R. 3173). On cross examination, Megorden reiterated the "charge" against Haworth (R. 3181, 3183), and reported in addition that the information was conveyed to him by Pickett, Haworth's assistant foreman, who "knew those who were the ringleaders" in the Union (R. 3182). Elaborating further, Megorden readily identified the "union" referred to as the IAM (R. 3182). Ample evidence thus supports the Board's conclusion that Haworth's union activities were the reason for his discharge. That there may have been adequate nondiscriminatory reasons for which he could have been discharged makes no difference if these were not the moving cause. *Wells, Inc.* v. *N. L. R. B.*, 162 F. 2d 457, 460 (C. A. 9); *N. L. R. B.* v. *Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 737 (C. A. 9), certiorari denied, Jan. 18, 1954.

3. Madeline Haddix

The evidence with respect to the layoff of Haddix is summarized *supra*, pp. 18–21. As shown, a few weeks before the layoff of Haddix, a generally satisfactory worker, her foreman wondered "who will be next" to go in an impending layoff, and then turning to Haddix said, "The trouble with you is that you belong to the wrong union." Told that her layoff was temporary and that she would be recalled, Haddix's repeated requests for reemployment were nevertheless denied without any credible explanation being

offered and despite the fact that a foreman specifically requested her assignment for work to his department. At the hearing, two foremen, James and Welling, testified that Haddix's layoff was occasioned by cancellation of a B–54 contract. But one of these foremen, James, was on vacation at the time of the layoff and did not participate in the layoff decision (R. 2684–2685); hence his explanation carries no weight. As to the cancellation of the B–54 contract assigned as the reason for the layoff by the other foreman, Welling, this contract was cancelled in April 1949 and resulted in layoffs during April and May of that year. But Haddix was not laid off until October 21, 1949, and thus well after the impact on employment of the B–54 contract cancellation. These circumstances amply support the inference that the reason for the layoff was belonging "to the wrong union," an inference strengthened by the inadequacy of the explanation for the layoff (*N. L. R. B.* v. *Dant,* 207 F. 2d 165, 167 (C. A. 9)), and by the lack of credible explanation for the failure to recall Haddix despite the statement that her layoff was temporary.

The Company contends (Br., p. 48) that the explanation concerning the B–54 contract cancellation in April was a slip of the tongue and that the foremen meant to refer to the layoffs occasioned by the "complete rescheduling of the B–50 contract" in August (R. 325). The Board is entitled to assume that knowledgeable aircraft foremen do not mean B–50 rescheduling when they refer to B–54 cancellation. The foremen were examined at the hearing by Company counsel who it is fair to assume would have

corrected their testimony if it were inadvertently inaccurate; it is sheer speculation to suppose that all were in error. The Company has thus advanced no ground adequate to justify displacement of the Board's fairly drawn inference.

4. Dorothy Schott

The evidence with respect to the demotion of Schott is summarized *supra,* pp. 21–22. As shown, Schott, an employee of the Company for many years, was demoted to a beginner's job shortly after the strike in which she participated as an IAM adherent. Commenting on her demotion, upon noticing that she wore an IAM union membership button, Assistant Foreman Lawrence said: "Well, Holy God, you have got the wrong button." Although the Company claimed that a surplus of welders required the downgrading, it made no explanation as to why Schott particularly was selected for demotion over other welders. The Board's inference that membership in the IAM was the reason for Schott's selection is thus reasonably based.[20]

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[20] No exception having been filed by the General Counsel to the trial examiner's failure to find that Schott's demotion was discriminatory, the Company contends that the Board may not review the question (Br., p. 55). If no exceptions are filed to any part of the examiner's report by any party, the Board may not review the examiner's report (Section 10 (c) of the Act); but if some exceptions are filed, as they were here, then the entire report of the examiner is open to inquiry, and the Board in its discretion to serve justice may review even that part of the report to which no exception was filed. See, *Salant & Salant, Inc.*, 87 N. L. R. B. 215, notes 2 and 3; *International Rice Milling Co.*, 84 N. L. R. B. 360, set aside, 183 F. 2d 21 (C. A. 5), reversed in part, 341 U. S. 665, setting aside an order to which no exceptions had been filed

5. Claude C. Myrick

The evidence with respect to the layoff of Myrick is summarized, *supra,* pp. 22–24. As shown, Myrick was a leader in the IAM, and upon his return to work after the strike, he was on one occasion instructed to remove his IAM committeeman button at the risk of discharge for disobedience, and on another warned to discontinue union discussion lest he be discharged for it. Thereafter, he was questioned by one foreman about his attitude if he were to be made a union steward again; told by another foreman that he would do better if he forgot "the unionism angle"; and warned by still another foreman that his layoff was contemplated because of his union activity. Myrick was laid off without any explanation; at the time of layoff he had next to the highest seniority standing in his department; and according to the testimony of two foremen and the superintendent, Myrick was a skillful employee.

The Company contends (Br., p. 51) that the "proper conclusion to be drawn from the record is that Myrick's slowness was the motivating reason for his layoff." To say the least, however, the circumstances disclosed fairly support the inference that Myrick's prominent union activity caused his selection for layoff. As between the two inferences, the one drawn by the Board being reasonable, that ends the matter.

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by union against which order ran and where the only exceptions filed were by General Counsel and employer complaining that order was not sufficiently broad.

6. Clyde N. McDonald

The evidence with respect to the layoff of McDonald is summarized, *supra,* pp. 24–25. As shown, McDonald was discharged within minutes after he rebuffed a professional Teamsters organizer with the remark that if ever he joined an A. F. of L. union it would be the Electrical Workers not the Teamsters. His precipitous discharge, coming without explanation, was effected by Foreman Dietz, who after a report from the Teamsters organizer told McDonald to "get your stuff together, and clear out."

Though contending that McDonald was laid off "because one of least qualified" (Br., p. 53), the Company's contention is unsupported by any testimony by Foreman Dietz, the moving party in McDonald's discharge, who neither at the hearing nor at the time of the layoff explained the reason for McDonald's selection. The only testimony concerning either the recency of McDonald's employment or his skill came from the general foreman who acknowledged that he had no recollection of McDonald as an individual. Nor did the Company call any of McDonald's immediate supervisors to testify as to his proficiency.

The circumstances thus amply support the Board's inference that express preference for the IAM and express opposition to the Teamsters was the occasion for McDonald's selection for layoff.

7. Arthur C. Gerber

The evidence with respect to the discharge of Gerber is summarized, *supra,* pp. 25–29. The Board's finding

that Gerber was the victim of discrimination differs from its other findings of discrimination in that in this instance it rests in part upon the reversal of a credibility determination made by the examiner. Since the examiner's credibility determination may have been based on his observation of the witnesses, we agree with the Company that due regard to the demeanor evidence which the printed record does not preserve requires that an examiner's findings "on veracity must not be overruled unless a very substantial preponderance of the evidence is against such conclusion" (Co. Br., p. 38). But giving weight to the demeanor evidence, discounted by its failure to correspond with the "consistency and inherent probability of testimony" (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496), we now show that the Board's conclusion is reasonably grounded, the examiner's credibility determination reasonably rejected, and that therefore the Board's finding should stand in "answering the comprehensive question whether the evidence supporting the Board's order is substantial" (*Id.*, at 497).

(a) We begin with the concurrent findings of the examiner and the Board concerning the events preceding and contemporaneous with the discharge of Gerber which are the context of the discharge and disclose the true reason for it. As shown [21] (*supra*, pp. 7–9, 26), Gerber, a timekeeper, was in the forefront of the movement to encourage members of the Teamsters to cancel their Teamsters dues deduction authorizations

[21] In uninterrupted sequence the testimony relevant to Gerber's discharge appears at R. 851–880, 2712–2719, 4137–4140.

and thereby to "get out of the Teamsters." To this end he wrote an article acquainting Teamsters members with the procedure for revoking checkoff authorizations and urging them to resort to it. The article was successful, resulting in a notable increase in cancellations, many of them handled by Gerber himself. The Company's displeasure was manifest. Supervisors previously amicable became unfriendly towards Gerber; and revocation of dues deduction authorizations, previously the function of the timekeepers, was transferred to the personnel department. And the extent to which Teamsters checkoff cancellations were unfavorably regarded by the Company was later strikingly confirmed when, the Teamsters having adopted "irrevocable" check-off authorizations, the Company departed from its own plant rule and assisted the Teamsters by refusing at the request of employees to cancel checkoffs on behalf of the Teamsters (*supra,* pp. 9, 34–36).

This was the context of Gerber's discharge. The article he wrote was published on November 18, 1948, widely distributed 2 or 3 days later, and resulted in the following week in a marked increase in Teamsters check-off cancellations (R. 864–867). On December 7, a short ten days later, without previous warning or indeed intimation, Gerber was summarily discharged, his termination notice stating "making threats to fellow employees" (*supra,* p. 26).

(b) Accordingly, the question reduces to whether the reason for Gerber's discharge is to be found in "making threats to fellow employees" or in inducing fellow employees to cancel dues deductions on

behalf of the Teamsters. Testimony ascribing Gerber's discharge to threats came from the chief timekeeper, Lynn Morrell, who was Gerber's ultimate supervisor. Acceptance of this testimony was the reason for the trial examiner's finding that Gerber was not discriminated against, the examiner stating "I credit the testimony of Lynn Morrell that he reasonably believed Gerber to be guilty of making threats to those who would not join Local 751 [IAM]" (R. 204). It therefore becomes critically important to examine this testimony closely in order to determine whether it is worthy of credence.

Morrell testified, (1) that the supervisor of the shop in which Gerber was working informed him of reports from "the personnel in his department that Mr. Gerber was making threatening statements to them, that if they did not join 751, they would be out of a job in 30 days" (R. 2713); (2) that together with the supervisor he investigated these reports speaking "to six or seven, possibly eight" employees, all of whom confirmed the reported threats (R. 2713); (3) that following these oral interviews, "some said they would and some said they would not" make "a written statement, for record purposes" (R. 2714); and (4) that written statements were "subsequently obtained" from the employees which "confirmed their oral statements" and "on the basis of that" Morrell participated in recommending Gerber's dismissal (R. 2714). On cross-examination, Morrell reiterated several times that he did not effect Gerber's discharge until after he had *personally* received and considered "*written* statements" (R. 2715–2716,

emphasis supplied). At the conclusion of his testimony, Morrell fixed the written character of the statements, that he personally received them, and their relationship in time to Gerber's discharge in the following questions and answers (R 2716–2717):

> Q. Who prepared the statements?
>
> A. They wrote them out themselves, in their own handwriting, and signed them.
>
> Q. Do you still have these statements?
>
> A. I don't have them myself, no.
>
> Q. Do you remember when they were prepared?
>
> A. Well, after the threats were made—within—well, I would say within a week from the time we first checked up on them until the statements were ready.
>
> Q. And how soon after getting the statements did you terminate Gerber?
>
> A. Oh, I would say within 2 or 3 days, approximately.

At the outset, we put to one side the Company's objection that Morrell did not testify that "he secured written statements and thereafter arranged for Gerber's discharge" (Co. Br., pp. 39–40); that is the heart of his testimony, its inescapable purport, and it is bootless to contend otherwise. Yet that testimony, as we now show, was flatly contradicted by the Company's own records and by the admissions of the Company's assistant labor relations manager.

Gerber was discharged on December 7 (R. 853, 4138). According to Morrell, he effected that discharge 2 or 3 days after obtaining the written statements. But according to the Company's records and the admission of its assistant labor relations

manager, no written statements were obtained until December 16, nine days after Gerber had already been discharged (R. 2726). According to Morrell, he personally participated in obtaining and reviewing the written statements. According to the Company's own records and the admission of its assistant labor relations manager, Morrell played no part in securing or considering the written statements (R. 2726, 2723–2724).

These are not peripheral contradictions but go to the heart of Morrell's testimony. Its essence was to convey the impression of a carefully considered discharge effected only after securing written confirmation of oral reports of threats. But the fact is, indisputably established by documentary evidence, that there was no consideration of written statements before the discharge, indeed no written statements at all until 9 days after the discharge, and Morrell played no part in securing those statements. Morrell's testimony was therefore either fabricated or so mistaken as to be worthy of no credence.[22]

(c) We turn now to consider what the record actually discloses concerning asserted threats by Gerber, mindful in this connection that the main prop underpinning this claimed basis for the discharge has been broken. From oral reports of threats supposedly

[22] In crediting this testimony the examiner took no account of its inconsistency with the documentary evidence, an inconsistency which observation of demeanor is incapable of resolving in favor of the witness' credence. Nor did the examiner evaluate this testimony in the light of Gerber's conduct in securing Teamsters check-off cancellations, conduct distasteful to the Company and followed swiftly by Gerber's discharge.

given by "six or seven, possibly eight" employees (R. 2713), we reduce to four written statements given by employees 9 days after the discharge (R. 2726), and only one of these statements suggests a threat even remotely (R. 2726, 2728). According to this statement, "Mr. Gerber told me that 751 was going to win the strike rights, and that I wouldn't have a job after 30 days they took over."

At best this statement only inconclusively establishes a threat. It may be merely the employee's garbled version of the accurate and unthreatening statement that if the IAM is selected as the exclusive bargaining representative and secures a union-shop agreement requiring acquisition of membership by employees within 30 days as a condition of employment, employees who fail to comply with the agreement may lose their jobs (Sec. 8 (a) (3) of the Act). At any rate, it is undenied that Gerber was never given any opportunity either to explain or deny this statement before his discharge, the discharge being effected without warning; at no time, before or after the discharge, were Gerber's accusers identified to him despite his request for their identification (*supra,* p. 27); Gerber appealed through every step of the managerial hierarchy protesting his innocence, requesting full investigation (*supra,* pp. 27–28); and at the hearing before the Board, Gerber explained in detail his blameless version of the incident with the employee whom he had purportedly threatened (R. 877–878). And it is to be observed that the examiner did not find that Gerber made threats, but only that Morrell reasonably believed he did (*supra,* p. 59),

and we have shown that Morrell's testimony is unworthy of credence.

Looking at the situation from the viewpoint most favorable to the Company, what emerges irreducibly is that supposedly for a single inconclusive threat (if threat there be) an employee of six years' standing is abruptly fired. Thus we have a "long-time, responsible and faithful" employee "discharged summarily, without preliminary warning, admonition or opportunity to change the act or practice complained of. Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as [the] reason * * * for the * * * discharge * * *, and had had no other circumstance in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice, would be almost inevitable." *Anthony & Sons* v. *N. L. R. B.,* 163 F. 2d 22, 26–27 (C. A. D. C.), certiorari denied, 332 U. S. 773. The conduct of the Company here is not that of a nondiscriminatorily minded employer but of an employer whose "true motive for Gerber's discharge," as the Board reasonably concluded (R. 276), "may be found in his successful efforts to induce members of Teamsters Local 451 to cancel their dues deduction authorizations."

IV. Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (4) of the Act by refusing to rehire Catherine Nielsen because she filed a charge with the Board

The evidence with respect to the refusal to rehire Catherine Nielsen is summarized *supra,* pp. 29–30. As

shown, when first laid off she was advised by the Company that she would be recalled in normal course when the workload permitted; but after she informed the Company that she had filed a charge with the Board alleging that her layoff was discriminatory, she was advised that she was unsuitable for rehiring. Section 8 (a) (4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." As recently pointed out, "Such breadth of statutory language is consistent only with an intention to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mutual Life Ins. Co.* v. *N. L. R. B.,* 191 F. 2d 483 (C. A. D. C.). See also, *N. L. R. B.* v. *Northwestern Mut. Fire Assn.,* 142 F. 2d 866 (C. A. 9), certiorari denied, 323 U. S. 726. Clearly the refusal to rehire Nielsen because she filed a charge with the Board violated the plainest prohibition of the Act.

The Company contends by way of defense that the real reason Nielsen was told that she was unacceptable for rehire was her poor production record (Co. Br., p. 61). Contradicting this assertion, however, is the admission of Assistant Superintendent Graue at the hearing "that there was nothing in her file which would prevent rehire, or a recommendation for employment elsewhere" (R. 2808), and that following a correction in her misapprehension of the scope of her duties, "her output was up to the point where it was satisfactory * * *" (R. 2818). In addition, before she filed her charge with the Board, Nielsen

was assured by the Company's personnel office, which of course had access to her record, that she would be rehired as soon as the workload permitted (R. 1966). Finally, it is a singular circumstance that an employee of six years' standing should suddenly be discovered to be an unsatisfactory producer. Under these circumstances, the Board reasonably concluded that the Company's refusal to consider Nielsen for rehire only after she filed a charge was discriminatorily motivated and in violation of the Act.

V. The allegations of the complaint with respect to the discrimination practiced against employees Hadix, Myrick, McDonald and Schott are adequately supported by charges timely filed within the meaning of Section 10 (b) of the Act

Section 10 (b) of the Act provides in part that:

> * * * no complaint shall issue based upon any unfair labor practices occurring more than six months prior to the filing of the charge with the Board * * *

The Company contends (Br., p. 72) that no timely charge was filed adequate to support the allegations of the complaint that Haddix and Myrick were discriminatorily laid off on October 21, 1949, that McDonald was discriminatorily laid off on August 9, 1949, and that Schott was discriminatorily demoted on April 18, 1949. As found, Haddix was selected for layoff because she belonged to the IAM, "the wrong union" (*supra,* pp. 52–54); Myrick was laid off because of his prominent position in the IAM (*supra,* p. 55); McDonald was laid off because of his express preference for the IAM and express

opposition to the Teamsters (*supra,* p. 56); and Schott was demoted because, as expressed by the foreman, "You have got the wrong button," referring to her IAM membership button (*supra,* p. 54).

The thread which binds the whole of respondents unfair labor practices, of which the acts of discrimination enumerated in the preceding paragraph are a part, is the Company's opposition to the IAM and preference for the Teamsters. The Board's inquiry into this course of conduct was initiated by a charge filed on September 20, 1948 (R. 1–4). This charge specified particular acts of favoritism for the IAM, including the charge that the Company (R. 1–2):

> Threatened to cause or secure the discharge of employees if they did not join said Teamster locals.

The charge also alleged acts of discrimination against 3 employees based on their IAM activity (R. 2). Relief requested in the charge, and thereby inferentially establishing the character of the wrongs claimed against the Company, included an order that "the Company stop discriminating against its employees in order to encourage or discourage membership in any labor organization" (R. 2). Another charge was filed on March 15, 1949 (G. C. Exh. 1–K), alleging in part that:

> * * * at various times since on or about September 14, 1948, the * * * company * * * [has] discriminated against the persons [named employees] listed on Exhibit "B," * * * in violation of Section 8 (a) (1) and (3) of the Act, by discharging said persons after

> they were reinstated after the date of September 14, 1948, because each of them engaged in concerted activity, and each was a member of Local Lodge 751 [IAM] * * *

The four acts of discrimination which the Company claims are unsupported by a timely charge are thus in the same class as those specified in the charges just summarized and are in furtherance of the objective maintained by the Company throughout, namely, to further the activity of the Teamsters and to hinder that of the IAM. The only difference is that the acts to which exception is taken took place after the filing of these charges. We submit that this makes no difference and that no new charge need be filed in order to enable the Board to investigate, adjudicate and redress unfair labor practices occurring after the filing of a charge which are fairly related to unfair labor practices already supported by a timely charge.

Before the amendment of the Act, it was settled that the Board was empowered to redress "unfair labor practices which are related to those alleged in the charge and which grew out of them while the proceeding is pending before the Board." *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 369. Further elaborating this principle, the Supreme Court stated (*ibid.*):

> The violations alleged in the complaint and found by the Board were but a prolongation of the [previous offenses]. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps,

> it had authority to deal with those which followed as a consequence of those already taken. We think * * * "the Board was within its power in treating the whole sequence as one."

Nothing in the six-month limitations proviso to Section 10 (b) changes this settled practice.[23] The function of the charge still is "merely to provide the spark which starts the machinery of the Act running." *Cusano* v. *N. L. R. B.,* 190 F. 2d 898, 903, n. 8 (C. A. 3).[24] The Act still must be "liberally construed to give the Board wide leeway for prosecuting offenses unearthed by its investigatory machinery, set in motion by the original charge," *N. L. R. B.* v. *Gaynor News Co.,* 197 F. 2d 719, 721 (C. A. 2), certiorari granted, 345 U. S. 902.[25] This Court has recently

[23] See *N. L. R. B.* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615 (C. A. 2), certiorari denied, 344 U. S. 816; cf. *Superior Engraving Co.* v. *N. L. R. B.*, 183 F. 2d 783, 791 (C. A. 7), certiorari denied, 340 U. S. 930.

[24] Accord: *N. L. R. B.* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8, 14–16 (C. A. 1); *N. L. R. B.* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C. A. 5); *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *N. L. R. B.* v. *Globe Wireless Ltd.*, 193 F. 2d 748, 752 (C. A. 9); *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. 2d 413, 415 (C. A. 10); *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719, 721–722 (C. A. 2), certiorari granted, 345 U. S. 902.

[25] As the Board has explained (*Cathey Lumber Co.*, 86 N. L. R. B. 157, 163):

"Were we to require that each unfair labor practice to be litigated be made the subject matter of a charge, which may be filed only by a private party, we would be leaving to private parties the complete responsibility for ferreting out violations of the Act, and determining what conduct constitutes violations. Such a course of action would emasculate the Board's long recognized investigatory power and would put the onus of investigation on

recognized the continuing vitality of these principles. *N. L. R. B.* v. *Martin,* 207 F. 2d 655, 656–657.[26] Accordingly, to say that when a charge has once been filed, and unfair labor practices nevertheless continue, the "spark" must be reapplied to empower the Board to deal with the after conduct, is to truncate the efficacy of the Act's processes to investigate and redress a single sequence of conduct.

Nor is there anything in the policy of repose to justify this enfeeblement. An offender against whom a charge has been filed can hardly claim that he has not been put on notice to preserve his evidence of what follows as well as of what precedes. Neither can he claim that there has been a failure of diligence in prosecution which has lulled him into a sense of security which should not be disturbed. Hence, as before the amendment to the Act, so now, the Board is empowered to deal with actions taken after a charge has been filed which are reasonably related to the offense theretofore claimed.

The validity of this principle has been squarely affirmed by the Courts of Appeals for the Third Circuit(*N. L. R. B.* v. *Epstein,* 203 F. 2d 482, 485, certiorari applied for by respondent) and the Fifth Circuit (*N. L. R. B.* v. *Harris,* 200 F. 2d 656, 658; *N. L. R. B.* v. *United States Gypsum Co.,* 206 F. 2d 410, 412, certiorari applied for by respondent). In *Epstein,* the Third Circuit stated, *supra:*

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private parties, a situation hardly consistent with the public nature of the Act and the agency created to administer it."

[26] See also, *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 415 (C. A. 9); *N. L. R. B.* v. *Globe Wireless Ltd.*, 193 F. 2d 748, 752 (C. A. 9).

> * * * we think that the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects.

In *Harris,* the Fifth Circuit stated, *supra:*

> Respondent makes no point that the violations found beginning February 16, 1950, all occurred subsequent to the filing of the last amended charge on February 14, 1950, but we make note of that fact for the purpose of considering whether the Board had jurisdiction to consider violations subsequent to the filing of the charge but prior to the issuance of the complaint. Clearly, we think there was such jurisdiction. The charge was of a continuing violation, a refusal to bargain on February 7, 1950, and "at all times since." The charge having set in motion the Board's inquiry, the complaint properly included matters occurring subsequent to the filing of the charge, and the issue respondent was called on to meet was the truth of the accusations in the complaint.

In *United States Gypsum, supra,* a charge was filed on April 25, 1949, specifying *inter alia* that an employee named Peoples was discriminatorily discharged on February 6, 1949 (206 F. 2d at 412). The Board found that his discharge in February was not discriminatory but that the failure to recall him to work in May or June, 1949 was (206 F. 2d at 413–414; 94 N. L. R. B. 112, 133). Although the discriminatory refusal to recall occurred subsequent to the filing of

the last timely charge, that charge was held to be an adequate predicate for the complaint alleging the failure to recall as a discriminatory act (206 F. 2d at 412).

Application of the principle illustrated by these cases is dispositive of the Company's contention here. The discriminatory acts committed subsequent to the filing of the September 1948 and March 1949 charges, while the whole course of the Company's conduct was before the Board for full inquiry, were of the same character as those charged and were in furtherance of the same program to promote the Teamsters and to defeat the IAM. The Board's authority to deal with the "first steps" having been timely invoked, it was wholly proper for the Board "to deal with those which followed" (*National Licorice* case, *supra,* pp. 67–68).

The Company mistakes the issue when it states that a discriminatory act is not a "continuing violation" but that the offense is completed when the act of discrimination occurs (Co. Br., p. 74). The question is not whether one discriminatory act has a continuing character or is a completed offense when done. The question is whether several discriminatory acts are so related to the same factual picture that it may be said that those occurring after the charge is filed are manifestations of the same practices in which the charge sounds. Is the conduct before and after the charge in its totality part of the same pattern? If it is, as it is here, the complaint alleging the subsequent acts is adequately supported by the prior charge.

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VI. The Board's order requiring the Company to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise" of their guaranteed rights is a proper exercise of the Board's discretion in formulating a remedy

The Board's order, in addition to enjoining the particular unfair labor practices found, required the Company to cease and desist from "In any other manner interfering with, restraining, or coercing its employees in the exercise" of the rights guaranteed them by Section 7 of the Act (R. 286). Explaining the reasons for this order, the Board stated that (R. 283–284):

> The Trial Examiner recommended that the [Company] cease and desist from the unfair labor practices found and from any like or related conduct. However, the [Company's] illegal activities, including interference, restraint, and coercion, unlawful assistance and support to Teamster Local 451, and discrimination against various of its employees, go to the very heart of the Act and indicate a purpose to defeat self-organization of its employees. We are convinced that the unfair labor practices committed by the [Company] are potentially related to other unfair labor practices proscribed by the Act, and that the danger of their commission in the future is to be anticipated from the [Company's] conduct in the past. The preventive purpose of the Act will be thwarted unless our order is coextensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, we shall order the [Company] to cease and desist from

in any manner infringing upon the rights of employees guaranteed by the Act.

Contesting the scope of the order, the Company claims that the unfair labor practices found do not support this evaluation of their import and fail to sustain the breadth of the order entered (Co. Br., pp. 75–80).

There is no question concerning the power of the Board to enter an order of this scope. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385. Power admitted, the sole question is as to the appropriateness of its exercise, and the test on judicial review is that an order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346–347. Based on the Board's findings, the order is well within the principle that "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed in the past or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 437. The numerous acts of discrimination alone suffice to support its breadth, for "a discriminatory discharge of an employee because of his union affiliations goes to the very heart of the Act." *N. L. R. B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4). This aside, the Company has engaged in the "general comprehensive offense" of interference, restraint, coercion and assistance, "and the order may be as broad as the offense." Judge (now Mr. Justice)

Minton in *N. L. R. B.* v. *Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 862 (C. A. 7). And these unfair labor practices, committed as part of the Company's promotion of the Teamsters in default of its obligation of neutrality, readily support the Board's determination that the Company had "an attitude of opposition to the purposes of the Act to protect the rights of employees generally * * *" *May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 393. If the gamut of unfair labor practices in this case is not an adequate basis for the Board's judgment that a broad order is necessary, it is difficult to know how egregious unfair labor practices must be before they are sufficiently so to warrant the conclusion that the order "in broad terms" is "essential to accomplish the purposes of the Act." *Id.*, at 391.

The Company places principal reliance on the trial examiner's view that a broad order was unnecessary (Co. Br., pp. 77, 79–80). We put aside the fact that the Board reversed the examiner in many respects (*supra*, pp. 12, 15, 30, 48), so that the scope of the unfair labor practices considered by the Board was wider than that before the examiner. The heart of the matter is that "the relation of remedy to policy is peculiarly a matter for administrative competence" (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194), and the competence which the statute exacts is the undiluted judgment of the agency heads. In the field of remedy the examiner's views contrary to those of the Board carry no detractive weight. "Conclusions, interpretations, law, and policy should, of course, be open to full review" by the Board uncontrolled by the exam-

iner's recommendations. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 494, quoting from Final Report, Atty. Gen. Comm. Ad. Proc., p. 51.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to set aside the Board's order should be denied and that the Board's petition for enforcement of its order should be granted in full.

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